Indeck Energy Services of Turners Falls, Inc. *and* International Brotherhood of Electrical Workers, Local 455, Petitioner. Case 1–RC–20089

February 14, 1995

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on August 18 and 26, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 10 for and 4 against the Petitioner with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations as modified and further discussed below, and finds that a certification of representative should be issued.

1. The Employer has excepted, inter alia, to the hearing officer's failure to apply the standard set forth in *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers IUE v. NLRB*, 67 LRRM 2361 (D.D.C. 1968), on remand 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970), to the facts in the instant case.[1]

We find the instant case distinguishable from *Athbro* and *Hudson*. We cannot find, under the standard set forth in those cases, that the Board agent's course of conduct, even considered collectively and cumulatively, warrants setting aside the election.

In *Athbro*, the Board set aside an election based on Board agent conduct even though no votes could have been affected by that conduct.[2] The Board stated that the commission of an act by a Board agent ''which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards'' is a sufficient basis for setting aside an election.

In *Hudson*, supra, the Board set aside an election where the Board agent had a loud argument with an employer's assistant manager concerning the assistant manager's presence in the dispatcher's office, which was located near the polling area, and threatened to stop the election if the assistant manager remained in the office. The Board affirmed the hearing officer's reliance on *Athbro* and found that the Board agent's conduct communicated the impression that the Board was displeased with and was criticizing the employer's assistant manager and thereby undermined the perception of Board neutrality in the election.

The conduct in the instant case involved fraternization between the Board agent and the Petitioner's observer which occurred during the course of the election and in the presence of the Employer's observer, but no eligible voters. Unlike the situation in *Athbro*, there was nothing in this situation occurring in the full view of the Employer's observer which would reasonably cause a witness to it to question the Board's neutrality. We agree with the hearing officer that this was simply a conversation of an innocuous nature among individuals who were brought together as a consequence of the election. This is distinguishable from the situation in *Athbro*, in which a witness to the beer drinking which occurred outside the presence of any representative of the employer in a location away from the site of the election could reasonably wonder about the relationship between the participants.

This case is also unlike *Hudson*, in which it would have been evident to any witness to the confrontation that the Board agent was displeased with the employer. Here there was nothing in the Board agent's conduct to indicate that the Board agent was biased against the Employer. While we do not condone excessive fraternization between Board agents and observers or representatives of the parties to an election, we do not believe that the level of fraternization involved here warrants a finding that the Board's neutrality was compromised. Accordingly, we agree with the hearing officer that the Employer's Objection 3 should be overruled.

The Employer also excepts to the hearing officer's failure to apply the *Athbro* standard to the conduct alleged objectionable in Objections 1 and 2. In Objection 1, the Employer alleges that the Board agent improperly failed to retrieve a copy of the election eligibility list which the Petitioner's observer had made for the Petitioner's representative, and contends that the Board agent's conduct with regard to the removal of the list for copying called the Board's neutrality into question. In Objection 2, the Employer contends that the Board's neutrality was compromised because the Board agent jokingly asked the Petitioner's representative to buy breakfast for the Board agent. We have carefully examined this conduct and have applied the *Athbro* standard to it. We find that the conduct, whether considered separately or cumulatively, was insufficient to call the Board's neutrality into question.[3]

[1] The Employer also relies on *Hudson Aviation Services*, 288 NLRB 870 (1988), which reaffirmed the *Athbro* standard.

[2] In *Athbro*, the Board agent in charge of the election was seen between voting periods having a beer with a union representative in a cafe about a mile from the plant. This incident was observed only by an employee who had already voted.

[3] See *Rheem Mfg*., 309 NLRB 459 (1992), and cases cited therein, affd. in the summary judgment proceeding 310 NLRB No. 116 (1993) (not reported in Board volumes), enfd. mem. 28 F.3d 1210 (4th Cir. 1994). In *Rheem* the conduct of two Board agents was at issue. During the election a Board agent complained about the exces-

2. The Employer has excepted to the hearing officer's failure to admit evidence concerning a statement allegedly made by the Board agent on the second day of the election. At the hearing the Employer made an offer of proof that on August 26, 1994, in the presence of the observers for both the Employer and the Petitioner, the Board agent stated, ''I was almost tempted to open [the challenged ballots].'' We find it unnecessary to pass on whether this evidence should have been admitted, because we find that even accepting the Employer's offer of proof and considering the testimony in the light most favorable to the Employer, the remark is insufficient to warrant setting aside the election.

We reject the Employer's contention that the remark indicates that the secrecy of the ballots was impaired. There is no evidence that any ballots were opened prematurely. While we do not condone remarks of this nature, we cannot find under the circumstances of this case that the remark, made outside the presence of eligible voters other than the Petitioner's observer who had already voted, even when considered cumulatively with all the other alleged misconduct involved in this case, raised a ''reasonable doubt as to the fairness and validity of the election.''[4] We have also examined the comment under the *Athbro* standard and we conclude that, whether considered separately or together with all the other evidence in this case, it did not tend to ''destroy confidence in the election process'' or ''reasonably impugn the election standards.''

3. We agree with the hearing officer, for the reasons stated in his report, that the removal and copying by the Petitioner's observer of the official voter eligibility list shortly before the election did not warrant setting aside the election. In this connection, we further note that the list was returned before the election began and there was no evidence that the list was tampered with in any way. Accordingly, we find that this incident was insufficient to raise a ''reasonable doubt as to the fairness and validity of the election.'' *Polymers*, supra.

The Employer argues, inter alia, that the election should be set aside because the Petitioner's observer and representative used the copy of the official list to make a list of employees who voted. We disagree. First, there is no clear evidence that they maintained such a list. Second, even if they did maintain a list, we would not find it necessary to set aside the election. In *Southland Containers*, 312 NLRB 1087 (1993), the Board stated that it will set aside an election on the basis that a voting list other than the official eligibility list was kept only if it can be shown or inferred from the circumstances that employees were aware that their names were recorded. Here, not only is it unclear that a list was actually kept, but there is no evidence that any employees even suspected that their names were being recorded. Under such circumstances we find no basis for setting aside the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Electrical Workers, Local 455 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All operations and maintenance employees employed by the Employer at the Turners Falls Energy Center in Turners Falls, Massachusetts, including shift supervisors, shift operators, shift mechanics, maintenance leader, electrician, and instrument and control technician, but excluding the office manager, guards, and supervisors as defined in the Act.

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sive heat in the voting area and stated, inter alia, that if he had to return to the plant in the future he might have to file his own petition, and that a large air conditioning company like the employer should be able to keep the area cool. The Board found the comment made to observers did not warrant setting aside the election even though the heat in the plant was an issue in the campaign. In so finding, the Board noted that the comment was not so extreme as to warrant a finding that the Board's appearance of impartiality was destroyed. The Board also found the comment not prejudicial in light of the fact that it was made only in the presence of the observers, and the employer's observer had already voted. In addition to the heat comment the Board agent also did not follow proper procedures concerning late-arriving voters (placing their ballots in his pocket) and during a break in the election another Board agent walked through the plant with a union observer, ''conversing in a friendly fashion and occasionally laughing.'' The Board stated that while it did not condone the Board agents' conduct, it was insufficient to warrant setting aside the election. We find the conduct in the instant case, even considered cumulatively, to be less extreme than that found unobjectionable in *Rheem*.

[4] *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).